SAMBU PERNAS CONSTRUCTION & ANOR. v. PITCHAKKARAN

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.) January 12 & 30, 1982]

[Kuala Lumpur — Federal Court Civil Appeal No. 37 of 1978]

Tort — Claim for damages for personal injuries — Claim against employer and co-worker — Claim by widower — Deceased insured under Employees Social Security Act, 1969 — Whether claim can succeed against employer or co-worker — Employees Social Security Act, 1969, s. 31 — Civil Law Act, 1956, ss. 7 & 8.

Social Security — Deceased an insured person under Act — Whether claim can be brought at Common Law against employer or co-worker — Employees Social Security Act, 1969, s. 31.

In this case the respondent was the widower of the deceased. The deceased was employed by the first appellant while the second appellant was a co-worker employed by the second employer. The deceased was working at the work site when she was knocked down by a motor car belonging to the first appellant and driven by the second appellant. She died as a result of her injuries.

The deceased had been insured by the first appellant under the Employees Social Security Act, 1969. The respondent claimed damages under sections 7 and 8 of the Civil Law Act, 1956 for the benefit of himself and his children on account of loss and damages suffered by the deceased's death. The learned trial judge gave judgment for the respondent and held that the appellants were liable. The appellants appealed.

Held: (1) in this case for the respondent to succeed he must show (a) that the death of the deceased was caused by the wrongful act, neglect or default of the appellants and (b) that the default by the appellants was such as would, if death had not ensued entitled the deceased to maintain an action and recover damages in respect of the injuries sustained by her;

(2) although in this case the first condition was fulfilled, that is, that death was caused by the wrongful act, neglect or default of the appellants, the deceased (if she were alive) would have been barred from suing the first appellant because of section 31 of the Employees Social Security Act, 1969, but she would not have been barred from suing her co-employee, the second appellant;

(3) the respondent's position cannot be better or worse than that of the deceased herself and must be the same;

(4) the respondent is barred from suing his deceased wife's employer by reason of section 7(1) of the Civil Law Act read with section 31 of the Employee's Social Security Act, but is not barred from suing his co-employee.

Cases referred to:-

(1) *Che Noh bin Yacob* v. *Seng Hin Rubber (M) Sdn. Bhd.* [1982] 1 M.L.J. 80.

(2) *Tan Peng Loh* v. *Lee Aik Fong & Anor.* [1982] 1 M.L.J. 74.

(3) *Baker* v. *Bolton* (1808) 1 Camp. 493.

(4) *Read* v. *Great Eastern Rly. Co.* (1868) 3 L.R. Q.B. 555.

(5) *Haigh & Ors.* v. *The Royal Mail Steam Packet* (1888) 52 L.J. Q.B. N.S. 640.

(6) *Williams* v. *Mersey Docks and Harbour Board* [1905] 1 K.B. 804.

(7) *British Electric Rly. Co.* v. *Gentile* [1914] A.C. 1034.

FEDERAL COURT.

Zainuddin Ismail for the appellants.

G. Sri Ram for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): The respondent is a widower whose wife named Lakshmi Kanta a/p Krishnanswarni (hereinafter referred to as "the deceased") died on January 26, 1975. The deceased was employed by the first appellant whilst the second appellant was her co-worker employed by the same employer, first appellant. At about 8.30 a.m. on January 26, 1975 whilst the deceased was working at the work site of the first appellant at Jalan Timor, Petaling Jaya she was knocked down by a motor lorry No. BAN 3231 belonging to the first appellant and driven by the second appellant. She was knocked down whilst the second appellant was reversing the lorry. As a result of the injuries caused to the deceased, i.e. shock and haemorrhage and crushed injuries to head, she died almost instantaneously, leaving a widower, the respondent, and eight children whose ages were at the time of death 20, 17, 16, 14, 11, 7, 6 and 5 years. The deceased had been insured by the first appellant under the Employees Social Security Act, 1969 under Insurance No. 32/094346.

On May 10, 1976 the respondent sued the first and second appellants claiming damages under sections 7 and 8 of the Civil Law Act, 1956 for the benefit of himself and the eight surviving children of the deceased on account of loss and damages suffered by them as a result of the deceased's death. The appellants denied liability. They claimed that they were not guilty of any negligence in the incident and in particular contended that they were not liable because the deceased being an insured person under the Employees Social Security Act, 1969 the respondent is barred under section 31 of the Act from bringing this action.

The case came before Harun J. on November 29, 1977, December 2, 1977 and February 22, 1978. A good deal of time was taken up before the learned judge on the question whether or not section 31 is applicable to the suit. Finally the learned judge held that the appellants were liable and made an order in the sum of $15,500 as General Damages with interest thereon at the rate of 6% from the date of the writ and $200 as Special Damages with interest thereon at the rate of 3% from the date of the death of the deceased and also cost of the suit. The appellants appealed against this decision to us and likewise the issue which was argued before us was solely on the question whether or not section 31 of the Social Security Act is applicable to bar the respondent from suing the appellants. The learned judge wrote no grounds of judgment, but it is obvious from his decision that he must have held that section 31 of the Employees Social Security Act does not apply to this issue.

At the start of the hearing of this appeal counsel for the appellants, having been apprised of the following two Federal Court decisions, conceded the point as regards the appeal by the second appellant, but continued to argue the appeal by the first appellant. We therefore dismissed the appeal by the second appellant with costs and thus proceeded to hear appeal by the first appellant only.

There are two previous decisions of the Federal Court on section 31 of this Act. The first decision is the case of *Che Noh bin Yacob* v. *Seng Hin Rubber (M) Sdn. Bhd.*[1] in which the court held that sections 31 and 42 bar an insured person from suing his employer in respect of an employment injury suffered by him. In the second decision in the case of *Tan Peng Loh @ Lam Peng Low* v. *Lee Aik Fong @ Aik*

Kong & Anor.[2] the court reiterated its earlier judgment, and further held that although an insured person cannot sue his employer for damages in respect of employment injury, section 31 does not prevent him from suing a third party, such as his co-employee, whose negligence has caused injury to him.

The facts in the present case are in a way similar to those in *Tan Peng Loh's* case in that the employer and the co-employee of an insured person were sued except that in the present case the insured person is dead and that the suit is instituted by her widower under sections 7 and 8 of the Civil Law Act. There can be no doubt that had the deceased lived and sued her employer and her co-employee, *Tan Peng Loh's* case would have been a complete answer in that she would not be able to obtain judgment against her employer, the first appellant but would succeed against her co-employee, the second appellant. As the suit against the appellants was instituted by the widower of the deceased insured person, counsel for the widower submitted to us that despite these two Federal Court decisions, the respondent is not barred from suing for damages against both the appellants, because, he submitted, section 31 does not apply to a widower. Whilst we agree that a widower is not a dependant within the meaning of the Act and therefore *prima facie* not subject to section 31, and section 42, we must, however, look at this case from the point of view of the widower's (respondent's) title to institute this civil suit.

At common law the death of a person gives rise to two principles. The first is that the death of any person is not a civil wrong. Therefore no action can be founded on it although death may result in pecuniary losses or damages to the deceased's spouse and children. Lord Ellenborough C.J. in *Baker* v. *Bolton*[3] ruled that "in a civil court the death of a human being could not be complained of as an injury." The second principle was that when a person died any cause of action which was vested either in his favour or against him at the time of death was buried with him. In other words the cause of action did not survive the death: *"actio personalis moritur cum persona"*. The first principle which regarded death as not giving rise to any cause of action was rectified by section 1 of the Fatal Accidents Acts 1846 to 1959, popularly known as Lord Campbell's Act whilst the second principle which dealt with the non-survival of the cause of action was rectified by the Law Reform (Miscellaneous Provisions) Act, 1934. The provisions of these two UK statutes are now incorporated in sections 7 and 8 of our Civil Law Act, 1956.

Had it not been for sections 7 and 8 of the Civil Law Act it is clear that the respondent could not have the right to bring the suit, and having acted under these sections and in particular section 7, his case must stand and fall on the basis of these sections. We set out below section 7 of the Act as follows:—

"(1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code."

It is clear from these wordings that the respondent must satisfy at least two conditions before he could succeed in maintaining the suit. The first is that he has to prove that the death of the deceased was caused by "wrongful act, neglect or default" of the appellants. In view of the decision of the learned judge in giving judgment for the respondent and further in the absence of counsel's argument on the matter, it must be taken that the first condition is fulfilled — i.e. death was caused by wrongful act, neglect or default of the appellants.

The second condition which must be fulfilled is that the respondent must show that the default by the appellants is such as would, if death had not ensued, have entitled the deceased to maintain an action and recover damages in respect of the injuries inflicted on her. Thus the test to be applied here is this: Would the deceased have been entitled to recover damages if she had not died and had sued the appellants? If so, her personal representative or any other person suing under section 7 would succeed. In *Read* v. *The Great Eastern Rly. Co.*[4] Blackburn J. dealing with the effect of section 1 of Lord Campbell's Act 1846, said that only in those cases where the person injured could have maintained an action would his personal representative have the right to sue; the intention of the enactment being that the death of the injured person should not free the wrong doer from liability. Thus if on the other hand as in *Haigh & Ors.* v. *The Royal Mail Steam Packet*[5] the deceased himself could not have recovered damages, her executor likewise could not recover damages under the enactment. In that case the deceased was a passenger in a steamer, which was involved in a collision as a result of which the deceased was killed. The ticket issued to the deceased by the steamer's owners excluded them from liability for such incident. It was thus held that as the deceased himself could not have recovered because of exclusion of liability, his executor therefore likewise could not recover. In *Williams* v. *Mersey Docks and Harbour Board*[6] Mathew L.J. at page 807 repeated the test by stating that there appeared to be a "general principle that, where an action could not have been brought by the deceased person, it cannot be maintained in respect of the same accident by his representative." In *British Electric Rly. Co.* v. *Gentile*[7] their Lordships of the Privy Council had occasion to interpret the provisions of the Families Compensation Act of British Columbia, which is *in pari materia* with the UK Fatal Accidents Act 1846 and therefore with section 7 of our Civil Law Act, 1956. Lord Dunedin, delivering judgment for the Board said:

"This, however, does not end the matter, for although the action under Lord Campbell's Act or the Families Compensation Act is not an action of indemnity for negligence, yet nevertheless it is an action which can only exist if certain conditions precedent are fulfilled. The first is that the death shall have been caused by wrongful act, neglect, or default of the defendants. That has in this case been affirmed by the verdict of the jury. The second is that the default is such 'as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof.'

Their Lordships are of opinion that the *punctum temporis* at which the test is to be taken is at the moment of death, with the idea fictionally that death has not taken place. At that moment, however, the test is absolute. If, therefore, the deceased could not, had he survived at that moment,

have maintained, i.e., successfully maintained, his action, then the action under the Act does not arise."

Reverting to the present case, and applying the test we have enunciated above we are of the opinion that had the deceased been alive and sued the appellants in respect of the injuries caused to her in this accident, she would have been barred from suing the first appellant because of section 31 of the Employees' Social Security Insurance Act (see *Che Noh bin Yacob* v. *Seng Hin Rubber (M) Sdn. Bhd.*[8] and *Tan Peng Loh @ Lam Peng Low* v. *Lee Aik Fong @ Aik Kong*[9]), but she would not have been barred from suing her co-employee, i.e. the second appellant. Consequently the respondent's position cannot be better or worse than that of the deceased herself. It must be the same. Whatever defence would have been available to the appellants against the deceased, if the deceased had survived and sued, would equally be available against the respondent. The respondent acting under section 7 of the Civil Law Act could not have a greater right of action than what the deceased herself had and since section 31 of the Employees' Social Security Insurance Act would have been applicable against deceased, if she had survived and sued, it is therefore equally applicable against the respondent.

Because of the view we have taken of this case, we do not think it is necessary to discuss the other arguments submitted to us by Mr. Sri Ram, counsel for the respondent in order to take the case out of the operation of section 31. We accept that the respondent is not a dependant within the meaning of the Employees Social Security Act, 1969, but we hold that section 31 of this Act bars him from suing his deceased wife's employer by reason of section 7(1) of the Civil Law Act, 1956.

Hence the appeal by the first appellant is allowed and the appeal against the second appellant is dismissed. As regards costs we agree with the submission of counsel for the respondent that the costs of appeal and the costs in the court below should be borne by the second appellant because it was not unreasonable for the respondent to sue the first appellant as another party. Moreover at the time when the suit was instituted the two decisions of the Federal Court were not yet delivered. We, therefore, make an order that the costs in the lower court as well as before us should be borne by the second appellant, and that the deposit should be refunded to the first appellant.

Order accordingly.

Solicitors: *Tunku Zuhri, Manan & Abdullah; Sri Ram, Chan & Chia.*

GIBB & CO. v. MALAYSIA BUILDING SOCIETY BHD.

[F.C. (Raja Azlan Shah C.J., Salleh Abas F.J. & Abdoolcader J). February 1 & 5, 1982]
[Ipoh — Federal Court Civil Appeal No. 186 of 1950]

Land Law — Land Development — Claim by building society for delivery of documents of title — Interlocutory injunction before trial — Balance of convenience.

Practice and Procedure — Interlocutory injunction before trial — Interlocutory injunction amounting to final relief — Balance of convenience.

In this case the respondent was a company providing finance for housing development. The developers applied to the respondent for end-finance for its housing project, and the respondent approved the application for 85 units in a total loan commitment of $1,457,100. The individual purchasers of the several units applied to the respondent for loans. The appellant acted as solicitors for all parties, that is, the respondent, the developer and the appellants. The respondents paid the amount due to the chargees of the land to enable the separate titles to be issued to the purchasers to be free from incumbrances. On obtaining the issue documents of title for the 85 units and other relevant documents the respondent handed them to the appellant for the requisite documentation. At this stage a dispute developed between the appellant and the developer who appointed new solicitors to act for it and also between the purchasers and the developer. The purchasers alleged that the developer had collected money for extras from them and as a result the price of the units had been increased. The appellant had caused the transfers in favour of the purchasers to be registered but in spite of repeated requests by the respondent failed to register the charges in favour of the respondent in respect of 82 units. The respondent appointed other solicitors to protect its interests. The respondent then lodged caveats against the land. It issued a writ to claim that it was entitled to the custody of the documents of title and instruments of charge and an order for the appellant to deliver the documents to them. It then applied for an interlocutory order for the appellant to forthwith deliver to it the issue documents of title and the instruments of charge. The High Court granted an order accordingly. The appellant appealed to the Federal Court. The grounds of appeal argued were —

(1) that in all the circumstances of the case and taking into account the fact that the relief sought for at the interlocutory stage amounted to final relief, the order ought not to have been made;

(2) that the balance of convenience, taking into account the fact that the order would in fact affect the rights of third parties not before the court, namely the developer and the purchasers, was against the making of the order.

Held: (1) although an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases, there is no reason why interlocutory and indeed interim mandatory injunctions should not issue in proper and appropriate cases and the court has jurisdiction to so order;

(2) in deciding the manner of interlocutory injunction that should be granted courts of equity will consider how the interests of the parties may best be protected, bearing in mind both the position of the parties subsequently at the final hearing and also questions of hardship and inconvenience in the meantime and will take into account any other relevant discretionary considerations which may arise;

(3) the court is not precluded from granting an interlocutory injunction where this would virtually give the applicant therefor on his claim the full relief actually sought to be secured at the final hearing when the matter is viewed on a balance of convenience. If there is plainly no defence to the action and the only object in raising a defence is delay, an injunction should issue even if it gives the applicant his whole remedy before the trial;

(4) the respondent in this case had expended a very large sum of money to provide finance for the purchasers in the housing project and must necessarily have security by way of charges over the several units in questions. Considering all the circumstances of the case, the right of the parties and